United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1058

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To be argued by
ALBERT S. DABROWSKI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1058

UNITED STATES OF AMERICA,

Appellee,

—v.—

HORACE MARBLE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Statement of the Case

On November 15, 1974 a Federal Grand Jury sitting in Hartford, Connecticut, returned a one-count indictment charging the defendant with the April 19, 1974 armed robbery of Constitution Bank and Trust Company in West Hartford, Connecticut in violation of Title 18, United States Code, Section 2113(a).

On June 6, 1974, approximately six (6) months prior to the indictment, a parole violators warrant was issued for the arrest of the defendant after he failed to report a change of residence and submit a supervision report to his parole officer in Hartford, Connecticut. The defendant had been released on parole on November 16, 1973 from the Federal Correctional Institution at Sandstone, Minnesota, where he had served a two-year sentence for conspiring to distribute narcotics in violation of Title 21, United States Code, Section 846. On October 23, 1974 the defendant was ar-

rested in New York City on the parole violators warrant. Within an hour of his arrest the defendant signed a written statement admitting that he robbed the Constitution Bank and Trust Company in West Hartford, Connecticut on April 19, 1974.

On December 9, 1974 Marble entered a plea of not guilty to the indictment. On Monday, January 6, 1975 a jury was selected and the case was scheduled for trial on January 28, 1975.

On January 9, 1975 a hearing was held on the defendant's Motion to Suppress his October 23, 1974 confession. At the conclusion of the hearing the defendant requested and received twenty-four (24) hours to file proposed findings of fact. On January 14, 1975 the Honorable T. Emmet Clarie, Chief Judge, issued a ruling denying the defendant's motion.

On January 29, 1975, prior to commencing trial, the defendant entered a plea of guilty to the indictment. On March 10, 1975 Judge Clarie sentenced the appellant to imprisonment for a term of ten years to commence upon the completion of his incarceration for parole violation. The appellant is presently incarcerated.

Statute Involved

Title 18, United States Code, Section 2113(a):

> § 2113. Bank robbery and incidental crimes
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Questions Presented

1. Did the District Court properly deny the defendant's Motion to Suppress where new and adequate *Miranda* warnings were given to the defendant who had earlier refused to answer any questions until he had a lawyer?

2. Was the defendant's confession voluntarily and intelligently given, without any threats, promises or coercion?

3. Was the Waiver Form signed by the defendant prior to his confession adequate to inform him of his constitutional rights?

Statement of Facts

The facts concerning the issues raised on this appeal were fully developed at the January 9, 1975 hearing on the Motion to Suppress.[1] At 1:30 p.m. on October 23, 1974, FBI Special Agents Matthew Cronin, Milton Ahlerich and Jerry Mortensen were in the vicinity of 112th Street and 8th Avenue, Harlem, New York when they observed the defendant accompanied by two others later identified as his wife and one George Bailey. The agents knew that a parole violators warrant had been issued for the arrest of Horace Marble and had been advised by the New York office of the Drug Enforcement Administration that Marble almost always carried a gun. Marble's identification was verified through a photograph possessed by Agent Ahlerich (Tr. at 44, 57-58).

The three agents approached Marble with their weapons drawn at which time Agent Mortensen orally advised the defendant that they were FBI agents, told him he was under arrest and instructed him to put his hands up against a nearby wall. Agent Cronin conducted a brief "pat down" search of Marble and advised him he was under arrest for a parole violation (Tr. at 19-21).

Diane Marble, the defendant's wife, refused to identify herself (Tr. at 133). George Bailey identified himself to the agents and then began yelling obscenities at the agents (Tr. at 59). The activity related to the arrest combined with the yelling and screaming of George Bailey attracted a large crowd. The agents feared for their safety and decided to leave the area immediately. Marble and his wife were handcuffed and placed in the rear seat of an automobile which quickly departed the area. George Bailey, who had walked away from the immediate vicinity of the arrest, was questioned by two New York Police Detectives but was not arrested (Tr. at 45).

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[1] References marked Tr. refer to hearing transcript.

In the car Agent Mortensen displayed his credentials, identified himself as an FBI agent, told Marble he was under arrest for parole violation and advised him of his constitutional rights by reading from a standard advice of rights card (Tr. at 6, 27). After the agents told Mrs. Marble that she was being detained to ascertain her identity she identified herself. During the twenty minute ride to FBI headquarters Marble complained that his handcuffs were too tight. Agent Mortensen examined the handcuffs and observed light passing between Marble's wrists and the handcuffs. Agent Mortensen concluded that the handcuffs were not too tight (Tr. at 30). At 1:50 p.m. when the car arrived at FBI headquarters, 201 East 69th Street, New York, Mrs. Marble indicated that she wanted to stay with her husband until the final disposition of this case (Tr. at 8, 54-55).

The Marbles were taken in an elevator to the FBI's Criminal Division where they were separated and strip searched. At 1:55 p.m. Marble, then in an interview room, was advised of his constitutional rights by Agent Mortensen who read from an "Advice of Rights" form (Government Exhibit One; Tr. at 11-12). Marble read and signed the form at 1:57 p.m. (Tr. at 11-12). Agent Mortensen told Marble he had been arrested as a parole violator but, in addition, the FBI was also interested in his knowledge of a Connecticut bank robbery. Marble stated words to the effect "we both know what happened in Connecticut" (Tr. at 12). He then indicated he did not want to make a statement until he had a lawyer with him (Tr. at 12, 33). Agent Mortensen then left the interview room to make arrangements for fingerprinting and photographing while Agent Ahlerich continued to ask Marble background questions (Tr. 12-13). While providing background information to Agent Ahlerich, Marble stated that he had changed his mind and wanted to make a statement about the bank robbery. Agent Mortensen re-entered the interview room

shortly before 2:13 p.m. and was told by Agent Ahlerich that Marble wanted to make a statement. At 2:13 p.m. Marble was handed a second "Advice of Rights" form which he signed at 2:14 p.m. (Tr. at 15-16). Marble then confessed to the bank robbery (Government Exhibit Two).

ARGUMENT

POINT I

The District Court properly denied the defendant's Motion to Suppress where new and adequate *Miranda* warnings were given to the defendant who had earlier refused to answer questions until he had a lawyer.

The appellant contends that the District Court erred in refusing to suppress his incriminating statement relating to the April 19, 1974 robbery of the West Hartford, Connecticut, bank. He asserts that the confession was made during an FBI interrogation after he stated he did not want to make a statement until he talked to his lawyer.

In support of his position the defendant cites *United States* v. *Crisp*, 435 F.2d 354 (7th Cir. 1970); *United States* v. *Priest*, 409 F.2d 491 (5th Cir. 1969); *United States* v. *Slaughter*, 366 F.2d 833 (4th Cir. 1966); *United States* v. *Wedra*, 343 F. Supp. 1183 (S.D.N.Y. 1972); *Combs* v. *Wingo*, 465 F.2d 96 (6th Cir. 1972); and *United States* v. *Blocker*, 354 F. Supp. 1195 (D.C. D.C. 1973). The facts in this case are a far cry from the flagrant abuses in those cases most of which involve intensive questioning immediately following a refusal to answer or a request for an attorney.

The appellant was never questioned nor addressed without being advised of all his constitutional rights. Shortly after 1:30 p.m. at the time of his arrest Marble was given *Miranda* warnings[2] and advised that he was under arrest for a parole violation. There was no mention of the FBI's interest in questioning him about the bank robbery in the automobile. At 1:55 p.m. Marble was taken to an FBI interview room where he read and signed an Advice of Rights form. Agents Ahlerich and Mortensen then began asking background questions concerning "height, weight, full name, employment and place of residence" (Tr. at 12). It was at this time that Agent Mortensen first mentioned the bank robbery:

> I once again advised Mr. Marble that he was under arrest for parole violation charges. However, I did also indicate that there was some question about a possible involvement in a bank robbery which occurred in the Connecticut area. And I asked him at this time if he wished to make any statements regarding his participation in this offense.
>
> At that time, Mr. Marble indicated to me that—words to the effect that "We both know what happened in Connecticut", however he would prefer not to make a statement at this time. (Tr. at 11-12).

There was conflicting testimony with regard to Marble's exact words concerning a lawyer.[3] However, Judge Clarie found as a fact that Marble indicated "he did not want to make a statement until he had a lawyer present with him." (Ruling at 5). In any event Agent Mortensen did not ask

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[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[3] Agent Mortensen testified that Marble stated he did not desire to make a statement until he talked to his lawyer (Tr. at 33). Agent Ahlerich testified that Marble stated that he didn't wish to make a statement but he never mentioned a lawyer or attorney (Tr. at 66). Marble testified that he said he would not say anything until his attorney was there (Tr. at 106).

any more questions and left the room to arrange for fingerprinting and photographing.

After Agent Mortensen left the room Agent Ahlerich continued to ask background questions. The defendant testified that such information was being taken down by the agents (Tr. at 107). Marble then stated that he had changed his mind and wanted to make a statement about the bank robbery. Agent Ahlerich testified:

> A. I began asking background questions, height, weight, date of birth, place employed where he had been in the last few months, where he was working—personal background data, identifying data.
>
> Q. And did he respond to your questions?
>
> A. Yes, sir, he did.
>
> Q. By providing you his name and address?
>
> A. All the questions that I asked, he voluntarily gave to me.
>
> Q. Was anything further mentioned about the bank robbery by you?
>
> A. No, sir, not at that point.
>
> Q. Did there come a time when the bank robbery did become a subject of conversation between you and Mr. Marble?
>
> A. Yes, sir.
>
> Q. How did that arise?
>
> A. I hadn't been interviewing—I hadn't been taking too many questions, and I asked a few, when he stated that the more he thought about this thing that he thought it probably would be best to get it out in the open and talk about it.
>
> Q. And by his statement, this thing—
>
> A. The bank robbery.
>
> Q. The bank robbery? He indicated he wanted to get it out in the open?
>
> A. Yes, sir.
>
> Q. What was your response to that?

> A. I said this would be something that he would have to do—it is not something that anybody else can make up his mind for him. It was something that he would have to do.
>
> And approximately at this time, Agent Mortensen came back into the room. I informed Agent Mortensen that Mr. Marble had indicated that he wanted to talk about the bank robbery. (Tr. at 67-68).

Marble was then given a second "Advice of Rights" form which he read and signed at 2:14 p.m. (Government Exhibit Two). Agent Ahlerich testified that this second form was used in view of Marble's earlier statement that he didn't want to talk about the bank robbery (Tr. at 69). Judge Clarie made a factual finding that Marble was given the second advice of rights form "to resolve any future question concerning Mr. Marble's knowledge of his rights in view of the fact that after reading the first form Mr. Marble indicated that he did not want to make a statement without the presence of his lawyer" (Ruling at 6).

The circumstances of this case differ substantially from the cases cited by the appellant. Marble was not questioned about the bank robbery at the time of his arrest nor during his transportation to FBI headquarters. After being advised of his rights at 1:57 p.m. he was asked one question about the bank robbery. He declined to answer and no further questions about the bank robbery were even asked. There simply wasn't any intensive questioning related to the bank robbery.

In *United States* v. *Hodge*, 487 F.2d 945, 46 (5th Cir. 1973), the defendant made a similar claim also based on *United States* v. *Crisp*, *supra*. Hodge, a soldier, was arrested and advised of his rights. After the defendant was taken to Military Police Headquarters and *Miranda* warnings were repeated Hodge requested an attorney. The inter-

view was terminated and then Hodge was informed of military procedure to obtain counsel and of the charges against him. Hodge then stated that he had changed his mind and volunteered to make a statement. He was advised of his right to counsel which he waived. The Court in *Hodge* distinguished *Crisp* as a case involving a defendant subjected to "intensive questioning immediately following a refusal to answer." (Id. at 947).

The law in this Circuit was established by *United States* v. *Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972). Collins was repeatedly questioned despite his refusal to answer. This Court ordered a rehearing *en banc* and issued a *per curiam* opinion to

> "resolve what appeared to be a difference of view whether a sentence in the majority opinion in Miranda v. Arizona, 384 U.S. 436, 473-474, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694 (1966), 'If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease,' required that interrogation must cease forever (save for the instance mentioned in fn. 44), or whether *Miranda* allowed renewal in proper circumstances." *Id.* at 801.

This Court held that "*Miranda* requires that 'interrogation must cease' until new and adequate warnings had been given and there was a reasonable basis for inferring that the suspect has voluntarily changed his mind." (*Id.* at 802).

The one question "interrogation" concerning the bank robbery did cease upon the defendant's refusal to answer any questions until he spoke with his attorney. When defendant brought up the subject of the bank robbery he was given new and adequate warnings as required by *Collins*. In addition, Agent Ahlerich told him that bringing the bank robbery "out into the open" had to be a result of his own choice.

In view of Marble's initial refusal to answer any questions until he talked with his attorney it is clear that he was fully informed of and understood his rights. Despite the earlier exercise of his rights Marble then changed his mind and voluntarily, knowingly and understandingly declined to exercise those same rights. In the absence of continuing intensive interrogation, and in view of the new and adequate warnings that were give, the District Court's ruling denying the defendant's motion to suppress was clearly proper. *See United States* v. *Cavallino*, 498 F.2d 1200, 02 (5th Cir. 1974); *Hill* v. *Whealon*, 490 F.2d 629, 635 (6th Cir. 1974); *United States* v. *Jackson*, 436 F.2d 39 (9th Cir. 1970), *cert. denied*, 403 U.S. 906 (1971).

POINT II

The defendant's confession was voluntarily and intelligently given, without any threats, promises, or coercion.

Both the defendant and his wife testified that threats were made by the FBI agents while in the automobile and after their arrival at FBI headquarters. These threats were allegedly directed at convincing Marble that harm would come to his wife unless he cooperated. Mrs. Marble was initially detained because she refused to identify herself, a fact which she admitted at the suppression hearing (Tr. at 133). After she identified herself in the car Marble asked the agents why she couldn't be released. Agent Mortensen stated that "there was a possible violation of the harboring statute" (Tr. at 54). However, Mrs. Marble was never told she was under arrest nor actually placed under arrest. In fact, the reason she wasn't released when the car arrived at FBI headquarters was not because she was being detained any longer but as Agent Mortensen testified "she indicated at this time that she would like to stay with her husband until the final disposition of the case" (Tr. 54-55). FBI

safety procedures if not common sense dictated a search of Mrs. Marble before her "release" in the presence of her husband, a convicted felon, parole violator and then suspected bank robber who was believed to frequently carry a weapon. Mrs. Marble was taken to a separate area of FBI headquarters at approximately 1:55 p.m. Marble confessed to the bank robbery at 2:13 p.m. some 18 minutes later. While a separation of several hours might have had a coercive effect on Marble it is unreasonable to infer that an interval of only 18 minutes could have played a significant role in his decision to confess.

As previously stated both the defendant and his wife testified that verbal threats had been made by the agents. Agents Ahlerich and Mortensen testified that no such threats were made. More importantly, Judge Clarie found the following as fact:

> At no time was Mrs. Marble told that she was under arrest for any charge including "aiding and abetting" or "harboring."
>
> At no time did any agent state to Mr. Marble that "you should worry more about your wife than the handcuffs" or words of that nature.
>
> At no time did any agent state to Mr. Marble that "if you hassle us we will hassle your wife" or words of that nature.
>
> At no time did any agent tell or promise Mr. Marble that if he cooperated and gave a statement his wife would be released.
>
> At no time did any agent tell Mr. Marble that if he did not cooperate and provide a statement his wife would be arrested.
>
> No promises or threats of any nature were made to Mr. Marble.

> The statement (Government's Exhibit 2) given to the agents by Mr. Marble was free and voluntary and was made with full knowledge and understanding of his constitutional rights.
>
> No unlawful pressure or coercion was utilized by anyone to influence the making of this statement.

Whether a confession is voluntary is a question of fact to be determined from the "totality of all the surrounding circumstances." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226 (1973). In *Schneckloth* v. *Bustamonte,* the Court pointed out a number of factors that have been considered in other cases including, but not limited to, the lack of advice concerning constitutional rights, the length of detention, the repeated and prolonged nature of the questioning and the use of physical punishment, but added that no case turned "on the presence or absence of a single controlling criterion." Marble was arrested for a parole violation at 1:30 p.m. He confessed to the bank robbery less than forty-five (45) minutes later at 2:14 p.m. Twenty-five (25) minutes of this time was spent transporting Marble to FBI headquarters and conducting a body search. During the entire forty-five (45) minutes he was advised of his constitutional rights on three separate occasions and was asked one question about the bank robbery. The defendant demonstrated that he was aware of his rights by initially stating that he did not desire to make any statements. When he changed his own mind the Agents advised him of his rights again. A review of the evidence developed at the suppression hearing fully supports the finding of the District Court that the confession was "voluntarily and intelligently given, without any threat, promise or coercion" (Ruling at 9) (*See Johnson* v. *Zerbst,* 304 U.S. 458, 64 (1968).

POINT III

The waiver form signed by the defendant prior to his confession was adequate to inform him of his constitutional rights.

The appellant asserts that the Advice of Rights Form read and signed by the defendant contains confusing and misleading language and is, therefore, inadequate in form to adequately advise a defendant of his rights under *Miranda*. The form reads as follows:

INTERROGATION; ADVICE OF RIGHTS
YOUR RIGHTS

Place .....

Date .....

Time .....

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer question now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed .....

Witness: .....

Witness: .....

Time: .....

The appellant's assertion that this form is inadequate is in direct conflict with well settled law in this Circuit holding that this language complies completely with all of the requirements delineated in *Miranda*. *United States* v. *Olivares-Vega*, 495 F.2d 827 (2d Cir. 1974), *cert. denied*, — U.S. —; *Massimo* v. *United States*, 463 F.2d 1171 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973).

This form has been judicially recognized as an effective form in other Circuits as well. In *Lathers* v. *United States*, 396 F.2d 524, 35 fn. 10 (5th Cir. 1968) the Fifth Circuit, faced with an insufficient warning, referred to a warning in *Hodge* v. *United States*, 392 F.2d 552 (5th Cir. 1968) as a "sample for an effective *Miranda* warning." The "effective *Miranda* warning" in *Hodge* is identical in language to the form in this case. *See also Wright* v. *State of North Carolina*, 483 F.2d 405 (4th Cir. 1973), *cert. denied*, 415 U.S. 936 (1974) (Douglas J., dissenting); *United States* v. *Lacy*, 446 F.2d 511 (5th Cir. 1971); *United States* v. *Potter*, 360 F. Supp. 68, 69 (E.D. La. 1973), *aff'd*, 490 F.2d 991 (5th Cir. 1974).

CONCLUSION

The Government, for the reasons submitted, respectfully urges that the Judgment of Conviction be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-1058

UNITED STATES OF AMERICA

Appellee

v.

HORACE MARBLE

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent
not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave
Brooklyn, N.Y.

That on the 6th day of May, 1975, deponent
ved the within Brief for the Appellee
on Gregory Craig, Federal Public Defender
770 Chapel Street, New Haven, Connecticut 06510

torney(s) for the Respondent in the action, the address designated by said attorney(s) for the
rpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post
ce official depository under the exclusive care and custody of the United States Post Office department
hin the State of New York.

Albert Sensale
ALBERT SENSALE

orn to before me,

6th day of May 1975

MICHAEL SILBERZWEIG
COMMISSIONER OF DEEDS
City of New York 2-1465
Certificate filed in Kings Count
Commission Expires Sept. 1, 1975

AEL SILBERZWEIG
SSIONER OF DEEDS
New York 2-1465
e filed in Kings Count
n Expires Sept. 1, 1975